# In the Court of Appeal of Alberta

**Citation: R v Choy, 2013 ABCA 334**

**Date:** 20131007
**Docket:** 1103-0289-A
**Registry:** Edmonton

**Between:**

**Her Majesty the Queen**

Appellant

- and -

**Lily Choy**

Respondent

## Restriction on Publication

**Identification Ban** – See the *Child, Youth and Family Enhancement Act*, section 126.2.

No one may publish the name or photograph of a child, or of the child's parent or guardian, in a manner that reveals that the child is receiving, or has received, intervention services.

**NOTE:** This judgment is intended to comply with the restriction so that it may be published.

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**The Court:**

**The Honourable Madam Justice Carole Conrad**
**The Honourable Madam Justice Ellen Picard**
**The Honourable Mr. Justice Clifton O'Brien**

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**Memorandum of Judgment**

Appeal from the Sentence by
The Honourable Madam Justice D.C. Read
Dated the 21st day of October, 2011
(Docket: 070121058Q2)

## Memorandum of Judgment

**The Court:**

[1] The respondent, a registered nurse, was charged with second degree murder in the death of a three-year-old foster child in her care. She was originally convicted by jury of manslaughter and sentenced to three years in prison, but that verdict was overturned on appeal and the matter returned to the Court of Queen's Bench for a second trial. By agreement, the second trial was heard by a judge alone, who once again convicted of manslaughter, but this time sentenced the respondent to six years' imprisonment, minus six months for pretrial custody. The respondent's appeal of conviction to this court was dismissed: 2013 ABCA 114. The Crown now appeals the respondent's sentence, seeking a sentence of twelve to sixteen years.

[2] At the time of the offence, the appellant was a single mother with two young children of her own and two foster children. A live-in nanny was in her employ. The victim had been placed in her care on December 5, 2006. On January 26, 2007, Emergency Medical Services were dispatched to the respondent's house where they found the child unconscious in the main floor bathroom in his underwear. He had a significant head injury, extensive bruising over much of his body, and his body temperature was well below normal. The child was taken immediately to the Stollery Children's Hospital where physicians were unable to save his life. The cause of death was later determined to be cranial trauma.

[3] At trial, the respondent testified that the child had been injured when she had been carrying him to the bathroom. He had allegedly been kicking and screaming and the respondent testified that she lost control of him and he hit his head on the toilet. The trial judge rejected this evidence. She found that the brain injury was caused by "a rather considerable application or applications of force" by the respondent, and that the bruising on the child's body had been caused by assaults and spanking that had been administered by the respondent in the days preceding the child's death. The judge also accepted evidence that the child had been placed in an unheated garage on several occasions, for disciplinary purposes, and that he had spent an unknown amount of time in the garage on each of the two nights prior to his death.

[4] The trial exceeded 20 days in length. The trial judge heard extensive expert medical evidence about the injury to the child's brain and the possible causes of the injury that led to his death. In her lengthy oral judgment convicting the respondent, she concluded:

> Notwithstanding that I do not know exactly what action or actions Ms. Choy caused his terrible brain injury, I am satisfied that some act or series of acts of Ms. Choy on the night in question were a significant contributing cause of [the child]'s death. Thus she is legally responsible for his death. [SAR 60/13-17]

[5] She expanded on these comments further in her reasons, explaining:

> On the evidence, the child's injuries were caused over time, whether it was three seconds or three days, Dr. Levin could not say. I cannot determine on the evidence that Ms. Choy knew or ought to have known that the bodily harm she undoubtedly knew would result from what she did to [the child], would cause [the child]'s death or was likely to do so and was simply reckless about whether or not death would ensue. I have grave suspicions on this evidence but suspicion is not enough. [SAR 62/308]

[6] At the sentencing hearing, the Crown submitted that this was a case of "near murder" and that the respondent ought to be sentenced to a period of imprisonment between twelve and sixteen years. Respondent's counsel, on the other hand, submitted the judge ought to impose the same three-year sentence imposed following the first trial. The judge stated that her objective at sentencing was to give a sentence commensurate with the offender's level of moral culpability when she committed the offence. She explained that she would not impose the same sentence as at the first trial, because she had more comprehensive medical evidence before her that persuaded her of the seriousness of the offence.

[7] The trial judge cited this Court's decision in *R v Laberge*, 1995 ABCA 196, 165 AR 375. In that case, Chief Justice Fraser stated, at para 6:

> All unlawful act manslaughter cases have two common requirements - conduct which has caused the death of another; and fault short of intention to kill. However, despite these common elements, the offence of unlawful act manslaughter covers a wide range of cases extending from those which may be classified as near accident at the one extreme and near murder at the other: *R. v. Cascoe* [1970] 2 All E.R. 833 (C.A.); *R. v. Eneas* [1994] B.C.J. No. 262 (B.C.C.A.). Different degrees of moral culpability attach to each along a continuum within that spectrum. It is precisely because a sentence for manslaughter can range from a suspended sentence up to life imprisonment that the court must determine for sentencing purposes what rung on the moral culpability ladder the offender reached when he committed the prohibited act. The purpose of this exercise is to ensure that the sentence imposed fits the degree of moral fault of the offender for the harm done.

[8] Here, the trial judge found that any reasonable person would have known that the force administered by the respondent was likely to put the child at risk of, or cause, serious bodily injury or life-threatening injuries. However, as she could not determine any subjective intent on the part of the appellant, the trial judge specifically rejected that the respondent's level of culpability was at the "near murder" level (SAR 111/15-16).

[9] On this appeal, the Crown once again submits that this was a case of "near murder" and that the judge made a palpable and overriding error in making the contrary finding. It further submits that she erred in principle by focussing on the method of killing rather than on the type of harm that was objectively and subjectively foreseeable, and by overemphasizing the stress experienced by the respondent at the time of the offence.

[10] We are not persuaded that the trial judge's findings reflect palpable and overriding error. If a finding of near murder had been made, then we agree that a sentence in the range sought by the

Crown might have been appropriate. However, we are not satisfied that the six-year sentence imposed by the judge is internally consistent with the findings which she made. While not attaining the status of "near murder", the trial judge nevertheless pointed out that "Ms. Choy's blameworthy conduct is high" (SAR 111/1.40). That is so, particularly having regard to the following passage from her reasons:

> The act that killed [the child] was violent and serious. It could not have been otherwise given his terrible injury. It occurred in the context of Ms. Choy, again, putting the child in the cold garage in winter weather as some sort of cruel punishment. However, not only did Ms. Choy so severely abuse [the child] that he died on January 27th, the after [*sic*] acts that Ms. Choy committed that caused the death of this child was part of what I have found to be a repeated pattern of abuse. She had put him in the garage the night previously when he was forced to remain all night ill-clothed and wet from urinating in his disposable diaper and perhaps also from a cold shower. She also did something that night to cause a terrible bruise on the child's forehead obvious to everyone the child saw the next day. Prior to that, she had put him in the garage as a punishment on least [*sic*] one occasion and his body bore marks of severe spankings. [SAR 117/20-30]

[11] The injury that caused the child's death was neither spontaneous nor attributable to a momentary lapse on the part of the respondent. Nor did it happen in consequence of diminished intelligence. As earlier stated, the respondent was a registered nurse and functioning as such. It appears that the pattern of abuse was progressively becoming worse. As observed by the trial judge, the respondent had "time to reflect" on her behaviour and to call for help if she was unable to cope (SAR 117/32-37).

[12] The judge did not have the benefit of this Court's decisions in *R v Nickel*, 2012 ABCA 158, 524 AR 366 and *R v SDC*, 2013 ABCA 46, as they issued after she delivered her reasons in this case. *Nickel* laid out a framework for analysis of child abuse cases. In *Nickel* the majority stated that "perhaps the most important consideration when assessing moral culpability of the *actus reus* is the child's exposure to harm", (para 34). Here the exposure was prolonged, and at the hands of a caregiver entrusted to protect and nurture the child. His needs were not only disregarded; they were exacerbated by the injuries heedlessly inflicted upon him.

[13] In *SDC* the offender, 23 years of age, killed her four-year-old niece, who was in her custody, by severely beating her over a prolonged period. It was a case of near murder and the court pointed out that in such circumstances the usual range for manslaughter of a child is eight to twelve years, and closer to the upper range of that scale when the child is in the care of the perpetrator (para 49).

[14] Considering these authorities, and relying upon the finding of the trial judge that the respondent's moral culpability in this case is high, we have concluded that the sentence imposed is not proportional to the gravity of the offence and the moral blameworthiness of the offender, nor does it adequately reflect society's denunciation of the conduct in question. While the respondent's personal circumstances, including the stress she was under at the time of the offence,

are relevant, they cannot overwhelm the need to condemn serious crimes of violence against the most vulnerable members of our community.

[15] In result, we allow the appeal and increase the sentence by two years; i.e., a sentence of eight years' incarceration in a federal penitentiary less the reductions allowed by the trial judge at the time of sentencing.

Appeal heard on September 17, 2013

Memorandum filed at Edmonton, Alberta
this 7th day of October, 2013

Conrad J.A.

Authorized to sign for: Picard J.A.

O'Brien J.A.

**Appearances:**

J.B. Dartana
for the Appellant

M.T. Duckett, Q.C.
for the Respondent